

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CELIMAR SOLAR,	:	
	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
	:	
MILLENIU FINANCIAL, INC. and	:	NO. 01-CV- 4327
EQUICREDIT CORPORATION,	:	
Defendant.	:	

**MEMORANDUM**

**Green, S.J.**

**May \_\_\_\_\_, 2002**

Presently before the Court is Defendant EquiCredit Corporation's Motion to Dismiss Count I, Count II and Count IV of Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6).<sup>1</sup> For the following reasons, Defendant's motion will be denied.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This matter arises out of a mortgage loan transaction entered into between Plaintiff and Defendant EquiCredit Corporation (hereinafter "EquiCredit"), a subprime lender specializing in making loans to consumers with below average credit histories. (See Compl. ¶ 13.) According to the Complaint, Defendant Millenium Financial, Inc. (hereinafter "Millenium"), a mortgage brokerage corporation, represented to Plaintiff via telephone solicitation that she could obtain a loan from EquiCredit that would lower her monthly mortgage payments. (See Compl. ¶¶ 2, 8.) Plaintiff currently had a loan with New Century Mortgage Corporation with a monthly payment of \$194.26 and an interest rate of 11.25%.<sup>2</sup> (See Compl. ¶¶ 47, 50.) Subsequently, Plaintiff

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<sup>1</sup>Defendant is not seeking to dismiss the rescission claims set forth in Count II and Count IV of the Complaint.

<sup>2</sup>Plaintiff alleges that Millenium and EquiCredit knew the terms of Plaintiff's original loan and knew that Plaintiff had a fixed monthly income.

applied to EquiCredit through Millenium for a \$27,200.00 loan with an interest rate of 13.7%, but was rejected. (See Compl. ¶¶ 51, 52.)

Yet, without notifying Plaintiff of their denial of the initial \$27,000.00 loan, Millenium and EquiCredit offered Plaintiff a second loan of \$29,200.00 with an interest rate of 13.95%. (See Compl. at ¶¶ 54, 57.) The loan included fees to Millenium for \$1,443.96, fees to EquiCredit for \$381.00, and fees to American Bankers Assurance Company for Credit Life Insurance for \$1,972.15. (See Compl. ¶¶ 58, 59.) On or about April 24, 2000, Plaintiff accepted the terms of the second loan. (See Compl. ¶ 57.)

Following this closing, EquiCredit told Plaintiff that because the signatures on the loan documents did not match the signature on her identification, she would have to refinance the April 24, 2000 loan by signing new loan documents. (See Compl. ¶ 63.) Thereafter, on May 5, 2000, EquiCredit provided Plaintiff with a complete set of loan documents which refinanced the April 24, 2000 loan. (See Compl. ¶¶ 64, 66.) The new loan documents mirrored the April 24, 2000 loan documents except that the fees increased by nearly \$900.00 and the interest rate increased to 14.50%. (See Compl. ¶ 67). Moreover, as a condition for providing the new loan, EquiCredit required Plaintiff to pay off a \$20,000.00 loan which had a monthly payment of \$194.26, causing Plaintiff's monthly payment to almost double. (See Compl. ¶ 81.) Furthermore, despite having Plaintiff's Social Security award letter, the new loan application overstated Plaintiff's monthly income by \$1,096.20 and failed to list any deductions or living expenses paid monthly by Plaintiff. (See Compl. ¶¶ 73, 74.) Finally, Plaintiff executed a mortgage and note in favor of EquiCredit, granting EquiCredit a security interest in her home. (See Compl. ¶ 80.)

On or around October 25, 2000, Plaintiff requested that EquiCredit rescind the loan; EquiCredit refused to do so. (See Compl. ¶¶ 86, 88). Thereafter, on August 24, 2001, Plaintiff filed suit in this court.<sup>3</sup> In the Complaint, Plaintiff sought, *inter alia*, to rescind the mortgage and recover damages under the Real Estate and Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601, *et seq.* (Count I), the Federal Truth in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.* (Count II), and the Home Ownership and Equity Protection Act (“HOEPA”), 15 U.S.C. §§ 1639 and 1640, *et seq.* (Count IV).

Pursuant to Fed.R.Civ.P. 12(b)(6), EquiCredit moves to dismiss Count I, Count II (except the rescission claim) and Count IV (except the rescission claim) of Plaintiff’s Complaint, arguing that Plaintiff’s claims are time barred by the applicable statutes of limitations. Plaintiff responded to EquiCredit’s motion and EquiCredit filed a reply.

## **II. LEGAL STANDARD**

Pursuant to Fed.R.Civ.P. 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). When considering such a motion, the court may only rely upon allegations in the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents submitted by the defendant when the plaintiff’s claims are based on the document. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) (citations

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<sup>3</sup>Jurisdiction is premised on 28 U.S.C. § 1331 and this Court has supplemental jurisdiction over the state law claims alleged by Plaintiff in her Complaint pursuant to 28 U.S.C. § 1367(a). Venue is proper in the United States District Court for the Eastern District of Pennsylvania because a substantial part of the actions or omissions that gave rise to the Complaint took place in this District. See 28 U.S.C. § 1391(a).

omitted). The court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citation omitted).

### III. DISCUSSION

As a general rule, a statute of limitations begins to run when the cause of action accrues. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 (3d Cir. 1994). The doctrine of equitable tolling operates to stop the statute of limitations from running where the accrual date of the cause of action has already passed. Therefore, under equitable tolling, a plaintiff may bring suit after the statutory time period for filing a complaint has elapsed if she has been prevented from filing in a timely manner due to inequitable circumstances. See Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 240 (3d Cir. 1999) (citations omitted).

However, when a time limitation is considered jurisdictional, that time limitation cannot be modified and non-compliance is an absolute bar. See Oshiver, 38 F.3d at 1387. In determining whether a time limitation should be viewed as jurisdictional, the court must look to “whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.” Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 501 (3d Cir. 1998) (quoting Burnett v. New York Central R.R. Co., 380 U.S. 424, 427 (1965)). Thus, the court must consider the language, legislative history and purpose of the statute. See Ramadan, 156 F.3d at 501-05. Since the Third Circuit has interpreted this to mean that every federal statute of limitations may have equitable tolling read into it unless Congress expressly provides to the contrary, the applicable statute of limitations contained in RESPA, TILA and HOEPA are not jurisdictional and are therefore subject to equitable tolling. See Ramadan, 156 F.3d at 503-04.

The Third Circuit has identified three principal, although not exclusive, circumstances in which equitable tolling may be appropriate: (1) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; (2) where the plaintiff timely asserted her rights in an improper forum; or (3) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action. See Oshiver, 38 F.3d at 1387 (citations omitted). Therefore, equitable tolling is appropriate in order to avoid unjust results where there has been fraudulent concealment. However, the party seeking equitable tolling must demonstrate that she "exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient." Miller v. New Jersey Dep't of Corrections, 145 F.3d 616, 618-19 (3d Cir. 1998) (alteration in original) (internal citations omitted) (citations omitted).

RESPA, TILA and HOEPA each provide Plaintiff one year from the date of the alleged violation to bring an action.<sup>4</sup> As such, EquiCredit claims that because any violations committed in connection with the transaction occurred on or before May 5, 2000, the date of closing, Plaintiff's suit, commenced August 24, 2001, is clearly untimely and should be dismissed with prejudice. (See Def.'s Mot. at 2.)

Plaintiff does not dispute that all but one of the alleged violations took place on or before May 5, 2000, the closing date for the loan.<sup>5</sup> Therefore, absent some intervening circumstance, the applicable statute of limitations, which began to run no later than the date of the

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<sup>4</sup>See RESPA, 12 U.S.C. § 2614; see also TILA, 15 U.S.C. § 1640(e). HOEPA, 15 U.S.C. § 1639, is an amendment to TILA, and therefore is governed by the same statute of limitations.

<sup>5</sup>Plaintiff alleges that EquiCredit's failure to act within twenty (20) days of notification of rescission constituted an independent TILA violation. However, because EquiCredit does not seek to dismiss the rescission claims set forth in Counts II and IV, this issue merits no further discussion.

consummation of the loan, would have foreclosed Plaintiff's causes of action under RESPA, TILA and HOEPA filed after May 5, 2001. See, e.g., Chevalier v. Baird Savings Ass'n, 371 F. Supp. 1282, 1284 (E.D. Pa. 1974) (holding that time runs from date of consummation). However, Plaintiff claims that EquiCredit's false representations and failures to disclose information required by statute acts to equitably toll the applicable statutes of limitations.<sup>6</sup> (See Pl.'s Resp. at 4.)

EquiCredit counters by claiming that all of the terms of the loan agreement were made available to Plaintiff on the day of the settlement and the allegations of fraudulent conduct demonstrate that the circumstances "would have put her on notice that something was wrong." (Def.'s Reply at 3.) Finally, EquiCredit argues that even if it concealed the fees and failed to disclose the required information, Plaintiff did not, as required to equitably toll the statutes of limitations, exercise reasonable diligence in investigating and bringing her claims. (See Def.'s Reply at 5.)

Under the standard for a motion to dismiss, I must take all the well pleaded allegations as true and construe the Complaint in the light most favorable to Plaintiff and may grant such a motion only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Thus, Plaintiff's allegations of false representations and failed disclosures must be taken as true and must be given the benefit of all inferences. Moreover, considering that Plaintiff is alleged to suffer from a learning disability, it is not clear that she could have

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<sup>6</sup>Specifically, in Counts I and II of the Complaint, Plaintiff contends that EquiCredit failed to disclose its payment of a prohibited "kick back" to Millenium for \$292.00 in violation of 12 U.S.C. §2607(a) of RESPA and 15 U.S.C. §1605(a)(3) of TILA. In Count IV, Plaintiff contends that EquiCredit failed to provide the required disclosures under 15 U.S.C. §1639(a) of HOEPA.

understood the intricacies of the loan agreement and considering that Millenium, who had a fiduciary duty to represent Plaintiff, was alleged to be “bought off” by EquiCredit in violation of that fiduciary duty, the allegations in Plaintiff’s Complaint set forth circumstances in which equitable tolling may be appropriate. As such, EquiCredit’s contention that Plaintiff’s causes of action under RESPA, TILA and HOEPA are time-barred by the applicable statutes of limitations are, at this time, unpersuasive. Accordingly, I will deny EquiCredit’s Motion to Dismiss Count I, Count II (except the rescission claim) and Count IV (excepting the rescission claim) of Plaintiff’s Complaint.

An appropriate order follows.

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MILLENIUM FINANCIAL, INC. and	:	NO. 01-CV- 4327
EQUICREDIT CORPORATION,	:	
Defendant.	:	

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of May, 2002, upon consideration of Defendant EquiCredit Corporation's Motion to Dismiss Count I, Count II (excepting the rescission claim) and Count IV (excepting the rescission claim) of the Complaint, Plaintiff's Response and Defendant's Reply, **IT IS HEREBY ORDERED** that Defendant's motion is **DENIED**.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.

